

NO. 448742

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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BRITTANY ROBERTS,

Appellant/Plaintiff,

v.

SUZANNE HORSLEY, FREDERICK HORSLEY, KEITH TIMMER,  
and CHURCH OF THE LIVING WAY,

Respondents/Defendants.

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Appeal from the Superior Court of Washington  
for Pierce County  
(Cause No. 12-2-05018-5)

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**BRIEF OF APPELLANT**

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## I. INTRODUCTION

Appellant Brittany Roberts was sexually abused by respondent Suzanne Horsley for three years, from age 13 to 16.<sup>1</sup> Roberts went into counseling for the immediate effects, which included depression, anxiety, and intrusive thoughts. Yet at Roberts' young age, the seriousness of the impact on her life could not be known until she had lived and experienced the actual long-term effects.

Despite her efforts to put the abuse behind her, the consequences became more serious as Roberts grew up and entered adulthood. The impact caused the breakup of her marriage, sexual dysfunction and intimacy problems, difficulties in her job, and interference with spirituality.

In 1991, the Washington Legislature enacted RCW 4.16.340 to broaden the statute of limitations in child sexual abuse cases. An articulated purpose was to provide recovery for a victim like Roberts who was aware of some injury at an earlier date, but did not discover more serious injury until later. Roberts could not comprehend the extensive impact of the sexual abuse until life experiences occurred resulting in

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<sup>1</sup> Horsley was Roberts' youth leader at defendant Church of the Living Way when Horsley started sexually abusing Roberts. Respondent Timmer was the church pastor who was notified of the abuse early on, and failed to report or prevent two more years of abuse.

distinct serious consequences. She brought her suit within three years of realizing these harms from the abuse.

The Superior Court, misconstruing RCW 4.16.340(1)(c) to bar an abuse victim from filing a claim based on discovery in adult life of additional, new injuries or conditions related to the childhood abuse, dismissed Roberts' claim as time-barred, contrary to explicit legislative intent, history, and findings, and in spite of genuine factual issues raised by the evidence Roberts presented. Roberts respectfully asks this Court to reverse the summary judgment dismissal and remand for trial, because genuine issues of material fact exist to demonstrate that Roberts discovered new injuries from the abuse in 2011, making this action timely.

## **II. ASSIGNMENT OF ERROR**

Appellant Brittany Roberts assigns error to the Superior Court's grant of summary judgment in favor of respondents Suzanne and Frederick Horsley, Keith Timmer and Church of the Living Way, dismissing her claim of childhood sexual abuse as barred by the statute of limitations, RCW 4.16.340(1)(c).<sup>2</sup>

ISSUE RELATED TO ASSIGNMENT OF ERROR: In enacting RCW 4.16.340(1)(c) in 1991, the Washington Legislature specifically expanded the delayed-discovery statute of limitations for childhood sexual

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<sup>2</sup> Respondents are collectively referred to as "Horsley" herein.



abuse to include situations where, despite the victim's awareness of abuse-related injuries, "many years later", she discovers "more serious injuries" from the abuse. Roberts presented evidence raising genuine issues of material fact as to her discovery in 2011 of more serious injuries from the abuse inflicted on her as a child. Did the Superior Court err in dismissing Roberts' claim of childhood sexual abuse as a matter of law?

### **III. STATEMENT OF THE CASE**

#### **A. History Of Sexual Abuse To Roberts.**

Brittany Roberts was sexually abused by Suzanne Horsley from the summer of her 7<sup>th</sup> grade year, June of 2002 until 2004. She met Horsley, her church youth leader, in 6<sup>th</sup> grade. CP 33, Ex. 1, p. 144. The ensuing sexual abuse was extensive and intrusive. CP 34, p. 175. Horsley was prosecuted and convicted in Pierce County Superior Court Case No. 05-1-01775-1, involving multiple acts of molestation. CP 33, Ex. 4, pp. 167-174.

From October 2005 to July 2006, Roberts had 30 treatment sessions with Kelly Peck through Good Samaritan. Roberts, then 17 years old, was experiencing stress, anxiety, depression, anger and feelings of betrayal. CP 33, Ex. 2, p. 147. Her symptoms were severe. CP 33, Ex. 2, p. 148. She also felt guilt and self-blame. CP33, Ex. 2, p. 149. During treatment with Peck, Roberts was early in the process of "victim

clarification,” *i.e.*, understanding she was not at fault for the abuse. When she finished treatment her prognosis was guarded because she still had so much guilt and shame. CP 33, Ex. 2, pp. 150-151.

Peck believed Roberts would experience “potholes” or significant increases in symptoms, at various times, including when she had her first relationship, if she got married, and if she had children. CP 33, Ex.2, pp. 150-151. Roberts, at only 17 years of age, was not in a significant relationship nor employed at the time. It was impossible for anyone to predict how the abuse would affect her as she grew up and had significant life experiences. CP 33, Ex. 2, pp. 152-153.

Roberts went ahead with her life, moving to Wenatchee to live with her uncle. In 2008, she married her first boyfriend. After getting married and having a sexual relationship with her husband, Roberts started to face even worse flashbacks and emotions than she had ever had before. Roberts hated sex, felt dirty, and believed she was doing something wrong. Sometimes Roberts would lie there and try and hold back tears. Roberts never experienced this before because she was never in the situation. She felt like she was being taken advantage of. Sex never got easier and as time went on she began feeling like she was robbing her husband of something he should be able to enjoy. CP 34, p. 176.

Another issue Roberts faced after getting married was the prospect of having children. Roberts' husband wanted to have kids, but she did not. She was scared of something happening to her children like what happened to her (a common fear of childhood sexual abuse victims upon maturity). Roberts could barely take care of herself and the thought or idea of taking care of someone else scared her. As time went on, Roberts began to realize this was not healthy and not the way a marriage should be. CP 34, p. 176.

Roberts felt guilty for not wanting children or liking sex. Eventually, Roberts built a wall against her husband and pushed him away. Because of the abuse Roberts lost someone she truly loved and cared about. They divorced in 2011; Roberts believes the divorce was her fault. CP 34, p. 176.

Roberts also started experiencing significant impacts at work. As a volunteer volleyball coach, she started having bad dreams and flashbacks due to the age of the girls. She became instantly sad seeing how different she would have acted if she wasn't being abused. On other days she would get angry knowing that someone in the exact position as she betrayed the vulnerability of a child and trust they had in an adult. CP 34, pp. 176-177.

Roberts started pursuing a career as a firefighter. In this job, she also felt the impact of the abuse. She was afraid of falling asleep at the station because she often had nightmares about the abuse, and yelled in her sleep. She sometimes panicked knowing she might have to help a known child molester or someone who had hurt their child. After she started taking classes at the college and working at a fire department, she realized the effect on her job. CP 34, p. 177.

Roberts tried to return to church in 2007 and again in 2010, but found that religion was not comforting because of her abuse. Horsley was a church leader, and the reaction of the church leaders in blaming her made religion seem hypocritical. Roberts does not know if she will be able to return to church. CP 34, p. 177.

Getting older and facing new life situations showed Roberts how much the abuse affected her life. Roberts knew she needed to do something about the new trauma she was enduring. CP 34, p. 177.

Roberts entered treatment with psychologist Mary Dietzen, Ph.D., in November 2011, for the problems with sexuality, intimacy, sleeping, trusting and with religion. CP 34, p. 178; *see also* CP 33, Ex. 1, p. 142. She also had problems with her ability to focus (CP 33, Ex. 1, p. 143), and with authority figures in the workplace (CP 33, Ex. 1, p. 152). Dr. Dietzen testified that when Roberts began treatment in 2011, she was having

difficulties concentrating, intrusive thoughts, flashbacks, confusion about her sexuality, and had experienced intimacy problems resulting in her divorce. CP 35, p. 207.

Dr. Dietzen continues to treat Roberts who suffers from depression, anxiety, nightmares and intrusive thoughts. CP 33, Ex. 3, pp. 156, 165. She has had difficulty taking orders because of the control Horsley exerted over her. CP 33, Ex. 3, p. 164; CP 35, p. 207.

When Roberts started treatment, her depression was mild, as was her anxiety. CP 33, Ex. 3, pp. 161-162. She has many post-traumatic stress disorder symptoms. CP 33, Ex. 3, pp. 163-164. As she worked through the issues, as is often the case, her depression and anxiety have both worsened. CP 33, Ex. 3, pp. 161-163; CP 35, p. 208. These steps are necessary to recovery. CP 35, p. 208.

Regarding understanding of the impact of childhood sexual abuse, Dr. Mary Dietzen testified:

Q. Did you ask her [Roberts] how long she had felt this way, that the abuse by Horsley had taken from her certain things that she felt were important, such as intimacy, sexuality, and those kinds of things?

A. I got the impression that it's been in the last, you know, two -- two-plus years, because she's older now, she's -- she takes classes, she's out in the world, she's away from that environment, she's in a relationship -- got in this relationship with Jody.

So more of it has come to her -- you know, to the forefront in the last year or two, I would say, she's developed a lot more of an understanding of kind of the impact.

CP 33, Ex. 3, pp. 159-160. Further, Dr. Dietzen testified:

3. A body of research establishes that child sexual abuse can be a profoundly negative experience for the victim with significant immediate and long term impact on virtually every aspect of life. Research points to a wide range of psychological symptoms resulting from sexual abuse. These include impact on social, physical and psychological functioning including but not limited to: post-traumatic stress disorder, anxiety and depression, self-harm behaviors, suicidal thoughts, substance abuse (both drugs and alcohol), dysfunctional behaviors and relationship problems. A 1996 review (Neumann et al., 1996) of research reports notes that symptoms include dissociation, anxiety, sexual dysfunction, sleep disturbances, anger/hostility, substance use, revictimization, low self-esteem and self-concept impairment, depression, blame, guilt, helplessness, self-mutilation, suicidality, post-traumatic stress responses, obsessions and compulsions and somatization.

5[sic]. PTSD is a mental condition that can follow from a traumatic event (criterion A) and involves persistent re-experiencing of the event (i.e., feeling like it is happening again) or intrusive images (aka flashbacks) of the event (Criterion B), persistent avoidance of reminders of the event or numbing (criterion C) and symptoms such as sleep problems, anger, difficulty concentrating, hypervigilance or an exaggerated startle response (e.g., jumping to a noise that others might not react to). The number of victims of sexual assault with PTSD symptoms both in the acute and post acute vary from study to study, and that factors occurring before, during and after the traumatic event are associated with the onset of PTSD symptoms.

6. Overall, in studies of childhood sexual assault victims, a significant portion of women report problems with sexual desire, lack of physical response during sex, and arousal dysfunction.

7. The symptoms of PTSD vary over time. As survivors of sexual abuse get older, they tend to have PTSD symptoms surface at different times in their lives. Significant events such as marriage and having children may trigger strong emotions. It could also be during a crisis such as filing bankruptcy or filing for divorce, etc. In addition, survivors who have children tend to have PTSD symptoms surface when their child is at the age that the survivor was when the sexual abuse occurred.

CP 35, pp. 205-207.

**B. Procedural History.**

Roberts filed this lawsuit January 3, 2012. CP 4, pp. 1-6. Timmer and the Church of the Living Way (“the Church”) moved for summary judgment dismissal on April 4, 2013. CP 29, pp. 19-35. Horsley filed a joinder to that motion for summary judgment on April 19, 2013. CP 31, pp. 120-121. The Superior Court granted the motion by Order dated May 3, 2013. CP 39, pp. 269-270. This appeal timely followed. CP 42.

**IV. ARGUMENT**

**A. Standard Of Review.**

An appellate court reviews summary judgment de novo. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate if “there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” CR 56(c). When considering a summary judgment motion, the court must construe all facts and reasonable inferences in the light most

favorable to the nonmoving party. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

The statute of limitations is an affirmative defense on which Horsley has the burden of proof. *Korst v. McMahon*, 136 Wn. App. 202, 208, 148 P.3d 1081 (2006) (applying RCW 4.16.340(1)(c) to allow childhood sexual abuse claim, “the defendant bears the burden of proof as to the statute of limitations”; citing *Haslund v. City of Seattle*, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976)); CR 8(c).

The statute of limitations is a question of fact for the jury. *Oostra v. Holstine*, 86 Wn. App. 536, 543, 937 P.2d 195 (1997). See Section C(1) below. On her summary judgment motion, Horsley must prove that as a matter of law, Roberts actually knew the sexual abuse caused her serious injury more than three years before she filed her lawsuit (by January 2009). Because the serious impact on Roberts’ marriage, sexuality, career, and spirituality had not yet occurred, Horsley did not and cannot meet this burden.

**B. Legislative History and Judicial Application Of RCW 4.16.340.**

**1. Before RCW 4.16.340, Washington Courts Erroneously Barred Childhood Sexual Abuse Claims.**

In 1986, the Washington State Supreme Court declined to apply the discovery rule to a childhood sexual abuse claim, holding the victim’s action was time-barred under the statute of limitations, where she had



blocked the abuse from her conscious memory as the limitations period ran. *Tyson v. Tyson*, 107 Wn.2d 72, 727 P.2d 226 (1986). In *Tyson*, a daughter sued her father for childhood sexual abuse. *Id.* at 74. The daughter suppressed all memories of the abuse until nearly 14 years after the last assault, and filed her complaint within one year of recognizing the abuse. *Id.* The court affirmed summary judgment dismissal of her claim, citing lack of objective evidence and risk of stale claims:

It is proper to apply the discovery rule in cases where the objective nature of the evidence makes it substantially certain that the facts can be fairly determined even though considerable time has passed since the alleged events occurred. Such circumstances simply do not exist where a plaintiff brings an action based solely on an alleged recollection of events which were repressed from her consciousness and there is no means of independently verifying her allegations in whole or in part. If we applied the discovery rule to such actions, the statute of limitations would be effectively eliminated and its purpose ignored. A person would have an unlimited time to bring an action, while the facts became increasingly difficult to determine. The potential for spurious claims would be great and the probability of the court's determining the truth would be unreasonably low.

Given the substantial risks of stale claims in cases of this nature, we conclude that a literal reading of the statutes of limitation strikes the proper balance between the possibility of such claims and the right to bring an action. Under this application of the statutes, the plaintiff had until 3 years beyond the age of majority to bring an action. This provided the plaintiff with a reasonable opportunity to assert a claim while preventing the injustice that would result if the court had to decide the facts long after the alleged events occurred. We, therefore, hold that the discovery rule does not apply to an intentional tort claim where the plaintiff has blocked the

incident from her conscious memory during the period of the statute of limitations.

*Id.* at 79-80.

The next year, in *Raymond v. Ingram*, following *Tyson*, the Court of Appeals similarly dismissed a victim's claim of sexual abuse at the hands of her grandfather. *Raymond v. Ingram*, 47 Wn. App. 781, 783-84, 737 P.2d 314 (1987). The Court concluded the statute of limitations had run because the victim had always known that she was injured by the abuse:

Raymond admitted that, before she had therapy, she remembered the assaults and realized that as a child she had mental anguish associated with the sexual abuse. Before her therapy, she also had memories of the events giving rise to her cause of action and of some injury associated with those events.

*Id.* at 787. "It does not matter that Raymond had not discovered the causal connection to all her injuries, because when Raymond reached the age of majority she knew that she had substantial damages associated with the sexual abuse." *Id.*

**2. In 1988, The Legislature Enacted RCW 4.16.340 To Counter Judicial Decisions Barring A Victim's Childhood Sexual Abuse Claim Based on the Statute Of Limitations.**

In direct response to *Tyson* and similar cases, in 1988, the Washington Legislature created an expanded civil statute of limitations for

childhood sexual abuse cases, allowing victims to bring claims within three years of discovering the injury caused by the abuse:

All claims or causes of action based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within three years of the act alleged to have caused the injury or condition, **or three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act**, whichever period expires later.

Laws of 1988, ch. 144, § 1 (emphasis added).

**3. In 1991, The Legislature Amended RCW 4.16.340 To Extend The Childhood Sexual Abuse Statute Of Limitations Where The Victim's Discovery Of Resulting Injuries Is Delayed.**

The Legislature again broadened the avenues of relief for victims of childhood sexual abuse in 1991, creating a distinct new category for sexual abuse claims where the victim did not suppress the memories of the assault, but failed to connect the abuse to injuries or where the injuries did not manifest until many years after the abuse. The revised statute provides:

(1) All claims or causes of action based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within the later of the following periods:

(a) Within three years of the act alleged to have caused the injury or condition;

(b) Within three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act; or

**(c) Within three years of the time the victim discovered that the act caused the injury for which the claim is brought:**

PROVIDED, That the time limit for commencement of an action under this section is tolled for a child until the child reaches the age of eighteen years.

RCW 4.16.340; 1991 Wash. Legis. Serv. Ch. 212 (SHB 2058) (emphasis added).

The Legislature created a clear distinction between subsections (1)(b) and (1)(c) of RCW 4.16.340: “Section (1)(b) addresses repressed memory claims where the victim discovers his or her injury or condition was caused by a previously undiscovered act. In view of the subjective nature of repressed memory claims, it is understandable that a constructive discovery element might be imposed for such cases.” *Hollmann v. Corcoran*, 89 Wn. App. 323, 334, 949 P.2d 386 (1997). In contrast, “Section (1)(c), on the other hand, refers to the discovery of the causal connection between a known act and subsequent injuries including injuries that develop years later.” *Id.*

The Legislature adopted “findings and intent” which “make clear that its primary concern was to provide a broad avenue of redress for victims of childhood sexual abuse who too often were left without a

remedy under previous statutes of limitation.” *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn. 2d 699, 712, 985 P.2d 262 (1999). Findings 4 and 5 apply to situations described in subsection (1)(c), where the victim has been aware that the abuse was harmful, but fails to connect it to specific injury until many years later:

The legislature finds that:

(1) Childhood sexual abuse is a pervasive problem that affects the safety and well-being of many of our citizens.

(2) Childhood sexual abuse is a traumatic experience for the victim causing long-lasting damage.

(3) The victim of childhood sexual abuse may repress the memory of the abuse or be unable to connect the abuse to any injury until after the statute of limitations has run.

**(4) The victim of childhood sexual abuse may be unable to understand or make the connection between childhood sexual abuse and emotional harm or damage until many years after the abuse occurs.**

**(5) Even though victims may be aware of injuries related to the childhood sexual abuse, more serious injuries may be discovered many years later.**

(6) The legislature enacted RCW 4.16.340 to clarify the application of the discovery rule to childhood sexual abuse cases. At that time the legislature intended to reverse the Washington supreme court decision in *Tyson v. Tyson*, 107 Wn.2d 72, 727 P.2d 226 (1986).

It is still the legislature's intention that *Tyson v. Tyson*, 107 Wn.2d 72, 727 P.2d 226 (1986) be reversed, as well as the line of cases that state that discovery of any injury whatsoever caused by an act of childhood sexual abuse commences the statute of limitations. **The legislature intends that the earlier discovery of less serious injuries should not affect the statute of limitations for injuries that are discovered later.**

Laws of 1991, Vol. I, ch. 212, n.15 (emphasis added).

The House Bill Report on SHB 2058 provides insight on the Legislature's concerns prompting enactment of a third category of claims (RCW 4.16.340(1)(c)) where the emotional damage from the abuse is not apparent or discoverable until many years later. The "background" section of the Report identifies the Legislature's concern that "much more severe reaction[s]" such as "marital problems, sexual dysfunction, [and] extreme fears for safety of the victim's children from sexual abuse" may not occur until later in life:

In addition to the cases in which a victim may suffer injuries, but does not know that the sexual abuse caused the injury due to suppressed memory of the sexual abuse, a victim may remember the sexual abuse but **may have a delayed reaction to the abuse and begin to experience significant suffering from the abuse later in life.** A victim may have experienced some trauma from the abuse at the time it was occurring, but either **was a child at the time**, or the trauma was not significant enough to prompt the victim to sue. For example, a child may have experienced stomachaches and nightmares at the time the sexual abuse was occurring, but the victim chooses not to sue for that injury within three years after the victim turns age 18. **The victim may have a much more severe reaction later in life, such as marital problems, sexual dysfunction, depression, suicidal tendencies, or extreme fears for safety of the victim's children from sexual abuse. At that time the victim may choose to sue for the abuse upon discovery of the injury.** However, in at least one case, the court has held that because the victim was aware of the sexual abuse, and experienced at least some injury from that abuse, i.e., the stomachache, the statute of limitations expired and the victim

is foreclosed from suit for the greater injury that developed later in life.

House Bill Report, HB 2058, Reported by House Committee on: Judiciary, March 6, 1991, Appendix A.

The Legislature recognized that some of the most severe reactions to abuse might not manifest themselves until the abused child is an adult, facing adult situations: “The Legislature also intends that the discovery of minor injuries from sexual abuse shall not trigger the statute of limitations for injuries that were not discovered **or did not manifest themselves until years later.**” Appendix A (emphasis added).

In 1999, the Washington Supreme Court explicitly acknowledged that RCW 4.16.340 was enacted in response to *Tyson*. *C.J.C. v. Corporation of Catholic Bishop of Yakima*, 138 Wn.2d 699, 712, 713, 985 P.2d 262 (1999). *C.J.C.* observed that Washington courts had been construing the discovery rule too narrowly, and needed to instead follow the Legislature’s lead in providing broad avenues of relief for victims of childhood sexual abuse. *Id.* “[T]he Legislature specifically provided for a broad and generous application of the discovery rule to civil actions for injuries caused by childhood sexual abuse.” *Id.*

The Court noted the Legislature’s deliberate action to broadly construe the discovery rule to permit childhood sexual abuse claims

involving newly manifested injuries: “Significantly, in 1991, the statute was broadened in order to make clear that the discovery of less serious injuries did not commence the period of limitations. In addition, the Legislature specifically superseded a line of cases that had strictly applied the discovery rule in cases involving childhood sexual abuse.” *Id.* at 713.<sup>3</sup>

Cases since the passage of RCW 4.16.340 in 1991 have repeatedly cited the need to broadly construe the remedial legislation:

Our Legislature has determined that a victim of childhood sexual abuse may know he was abused, but be unable to make a connection between the abuse and emotional harm or damage until many years later. He may also be aware of some injuries, but not discover more serious injuries until many years later. This is because of the insidious nature of childhood sexual abuse – it is a traumatic experience causing long-lasting damage.. Laws of 1991, vol. 1, ch. 212. Accordingly, our Legislature enacted RCW 4.16.340(1) under which a victim of childhood sexual abuse may sue the abuser for damages suffered as a result of the abuse within the later of...(3) three

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<sup>3</sup> See also *Miller v. Campbell*, 137 Wn. App. 762, 766-67, 155 P.3d 154 (2007) (“The three-year statute of limitations on a claim arising from an act of childhood sexual abuse does not begin to run at least until the victim discovers ‘that the act caused the injury for which the claim is brought.’ RCW 4.16.340(1)(c). Legislative findings supporting this statutory discovery rule state the Legislature’s intent ‘that the earlier discovery of less serious injuries should not affect the statute of limitations for injuries that are discovered later.’ Laws of 1991, ch. 212, § 1. The legislative findings disapprove of ‘the line of cases that state that discovery of any injury whatsoever caused by an act of childhood sexual abuse commences the statute of limitations.’ Laws of 1991, ch. 212, § 1. An example of this line of cases is *Raymond v. Ingram*, 47 Wn. App. 781, 737 P.2d 314 (1987), a case holding on facts similar to Miller’s that the statute of limitations expired, but which relied on *Tyson v. Tyson*, 107 Wn.2d 72, 727 P.2d 226 (1986), the case the legislature expressly intended to reverse by enacting RCW 4.16.340.”); *Doe v. Sheriff*, 11 Fed. Appx. 828, 831 (9<sup>th</sup> Cir. 2001) (the statute was passed in part because “[t]he victim of childhood sexual abuse may be unable to understand or ... [connect] .... childhood sexual abuse [to] emotional harm or damage until many years after the abuse occurs.” *Id.* (quoting *Oostra v. Holstine*, 86 Wn. App. 536 (1997), and legislative history).



years of the time the victim discovered that the abusive act caused the injury for which the claim was brought.

*Cloud v. Summers*, 98 Wn. App. 724, 733, 991 P.2d 1169 (1999).<sup>4</sup>

**C. RCW 4.16.340(1)(c) Protects A Victim's Right To Sue Her Abuser When Effects Of The Abuse Manifest During Adult Life.**

The Superior Court's dismissal of Roberts' claim as time-barred under RCW 4.16.340(1)(c) disregards the above legislative history, findings, and intent and violates the entire purpose of that law.

**1. *Carollo v. Dahl*, Relied On By Horsley, Is Contrary To Legislative Intent.**

In their motion, Horsley characterized Roberts' claims as a continuation of the problems for which she first saw mental health counselor Kelly Peck in 2005. Horsley contends Roberts knew enough about her injuries at that time and that Dr. Dietzen's diagnosis in 2011 identified nothing new. CP 29, p. 23. "Here the undisputed evidence is that as early as 2005, Roberts recognized the injuries that she now alleges, and she clearly connected those injuries to the abuse at the time."

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<sup>4</sup> The Court in *Cloud* was unequivocal that the legislative intent in enacting RCW 4.16.340 was to expand the time allowed for victims of child sexual abuse to bring civil claims:

Indeed, as our Legislature has found, childhood sexual abuse, by its very nature, may render the victim unable to understand or make the connection between the childhood abuse and the full extent of the resulting emotional harm until many years later. Until that "disability" is lifted, the cause of action either will not accrue or, if accrued, the running of the statute of limitations will be tolled.

*Id.* at 735.

CP 29, p. 31. To the contrary, Roberts vigorously disputes that assertion, and the record overwhelmingly refutes it.

Relying on *Carollo v. Dahl*, 157 Wn. App. 796, 240 P.3d 1172 (2010), Horsley argued: “when a victim of abuse recognizes his injuries are due to the abuse, the fact that the victim may develop more severe manifestations of prior injuries does not allow the victim to delay commencing suit.” CP 29, p. 32.

But *Carollo* is both distinguishable and incorrectly decided. At a minimum, whether Roberts knew in 2005-06 about the injury she became aware of in 2011 and its causal connection to Horsley’s abuse is a question of fact for the jury.

In *Carollo*, the male victim suffered sexual abuse at the age of 16, involving inappropriate touching, rubbing, and the abuser putting his hands into Carollo’s jeans. *Id.* at 798. In 1988, he sought counseling for emotional difficulties and was told that the molestation was likely the source of his psychological difficulties. *Id.* In 1995, Carollo again sought counseling and was diagnosed with PTSD, symptoms of depression, flashbacks, and nightmares.

Carollo’s PTSD became much worse in 2008. He was diagnosed with panic disorder, major anxiety, major depressive disorder, and agoraphobia. *Id.* at 799. He introduced objective evidence that he

suffered from new injuries (memory loss, dissociative periods, an inability to accomplish even minor tasks, and emotional damage that prevented him from resuming his career as a counselor of children). *Id.* The delayed onset of debilitating symptoms ended Carollo's career and left him as an emotionally crippled adult. These injuries are exactly the type that RCW 4.16.340(1)(c) was intended to address.

Carollo's counselor concluded the new diagnoses were related to the sexual abuse. *Id.* When Carollo sued for damages caused by the abuse, defendants successfully moved for summary judgment on the ground that the statute of limitations had run. *Id.* On appeal, Division Three affirmed the dismissal of Carollo's claim. Notably, the Court injected a new element into RCW 4.16.340(1)(c) (without citation to authority), stating that Carollo's later-discovered injuries had to be "qualitatively different" than previous ones:

Appellate courts have found actions in compliance with the three year limitation of RCW 4.16.340(1)(c) in two sets of circumstances: (1) **where there has been evidence that the harm being sued upon is qualitatively different from other harms connected to the abuse which the plaintiff had experienced previously**, or (2) where the plaintiff had not previously connected the recent harm to the abuse.

*Id.* at 801 (emphasis added). The Court barred Carollo's claim, concluding his injuries were "more severe manifestations" of his earlier PTSD diagnosis:

Although legislative finding number five, concerning later discovery of harm, **might be read to support the contention that new symptoms related to a prior PTSD diagnosis result in a new cause of action**, a more reasonable reading of the finding is that the Legislature sought to give causes of action for *different* injuries discovered at different times rather than applying to more severe manifestations of a prior injury.

*Id.* at 803 (bold emphasis added). The Court opined that accepting Carollo's argument would amount to an "outright repeal" of the statute of limitations. *Id.*<sup>5</sup>

As noted, the statute of limitations is an affirmative defense on which Horsley has the burden of proof, *Korst v. McMahon*, 136 Wn. App. 202, 208, 148 P.3d 1081 (2006), and this is "properly a question for the trier of fact", not the court. *Oostra v. Holstine*, 86 Wn. App. 536, 543, 937 P.2d 195 (1997).<sup>6</sup> In *Oostra*, plaintiff was abused by her stepfather

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<sup>5</sup> In *Fleming v. Corporation of the President of the Church of Jesus Christ of Latter Day Saints*, 2006 WL 691331, \*5 (W.D. Wa. 2006), Judge Martinez responded to the same argument by citing the legislative intent and *Hollman*:

[T]he Court notes that the Washington State legislature is well aware of its ability to enact an outside time limit within which a claim may be brought. In the case of child sexual abuse cases, the legislature has chosen not to set such a limit. This Court does not intend to set that limit either. ...

The Court's decision comports with the legislative intent behind its broad discovery rule. As the *Hollman* court aptly highlighted, by adding section (c) to the statute, the legislature intended to address the fact that childhood sexual abuse causes long-lasting damage which may not be recognized or understood until many years after the abuse occurred. See *Hollmann*, 89 Wn. App. at 333, 949 P.2d 386.

<sup>6</sup> As discussed below, courts nationally recognize delayed discovery of injuries from childhood sexual abuse for purposes of the statute of limitations is a jury question.

from 1978 to 1987. She sought treatment for personal problems in 1993 and thereafter brought her claim. The Court approved the trial court's instruction to the jury that the defendant had the burden of establishing plaintiff "knew or should have known," on or **before** March 29, 1991 (3 years before she commenced her action) that the sexual abuse by Holstine proximately caused Oostra's injury. *Id.*

Washington courts consistently hold that application of the discovery rule in other contexts is a question of fact for the jury. *E.g., Winbun v. Moore*, 143 Wn.2d 206, 213, 18 P.3d 576 (2001).<sup>7</sup> RCW 4.16.340 is different, however, in that by omitting the "reasonableness" language of most statutes of limitation--"or reasonably should have discovered"—the statute relieves a childhood sexual abuse victim of the duty to discover her injuries until she is able to "understand the connection between those symptoms [‘emotional harm or damage’] and the abuse." *Korst*, at 207.

When the legislature amended RCW 4.16.340 in 1991, it "intend[ed] that the earlier discovery of less serious injuries should not affect the statute of limitations for injuries that are discovered later. Laws of 1991, ch. 212, § 1. In light of the legislature's findings, the *Hollmann* court interpreted the plain language of RCW 4.16.340(1)(c) as not imposing a duty on the plaintiff to discover her injuries in childhood sexual abuse cases. *Hollmann*, 89 Wn. App. at 334.

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<sup>7</sup> "The determination of when a plaintiff discovered or through the exercise of due diligence should have discovered the basis for a cause of action is a factual question for the jury."

*Korst*, at 207-08. This “special statute of limitations is unique in that it does not begin running when the victim discovers an injury. Instead, it specifically focuses on when a victim of sexual abuse discovers the causal link between the abuse and the injury for which the suit is brought.” *Id.* at 208.

Washington courts have determined that the standard to be applied regarding the child sexual abuse statute of limitations is a subjective one. “[T]he statute of limitations is tolled until the victim of child abuse **in fact** discovers the causal connection between the defendant’s acts and the injuries for which the claim is brought.” *Hollmann*, 89 Wn. App. at 325, (emphasis added). *See also Cloud v. Summers*, 98 Wn. App. 724, 734-35, 991 P.2d 1169 (1999).

Contrary to *Carollo*, as the legislative history for RCW 4.16.340 makes clear, the Legislature intended to provide an avenue of relief to address more severe reactions to the abuse that develop later in life. Nothing in the statute, legislative findings, or legislative history requires injuries to be “qualitatively different” than those earlier experienced. *Carollo*, 157 Wn. App. at 801.

The examples provided in the House Bill Report stand in direct opposition to *Carollo*’s flawed analysis. As the Legislature recognized, a

child's response to the emotional and physical trauma of the abuse might manifest as stomachaches and nightmares. Even when the victim connects those injuries to the abuse, that does not foreclose her right to sue for "a much more severe reaction" that may manifest later in life such as marital problems, sexual dysfunction, and a fear of having children who might in turn experience similar abuse. Although the Legislature did not categorize injuries in terms of a diagnosis, the Report's examples show the Legislature's acceptance of the fact that many injuries could relate back to a broad or common psychological diagnosis such as PTSD. The Legislature's focus was on the type of injury involved in the lawsuit, not the effects during or near childhood: for example, experiencing headaches as a child is a different type of injury than sexual dysfunction and marital stress as an adult.

In fact, *Carollo* concedes that legislative finding 5 "might be read to support the contention that new symptoms related to a prior PTSD diagnosis result in a new cause of action". *Id.* at 801. Dr. Dietzen's testimony establishes that the legislative findings apply in this case: Roberts experienced new conditions, including marital dysfunction, issues at work, more severe depression and anxiety, resulting in a new claim she

was unable to discover and connect to the abuse before. CP 35, pp. 207-208.<sup>8</sup>

All research confirms that PTSD encompasses a variety of conditions and injuries. CP 35, pp. 205-207. Recently, a leading national expert on childhood sexual abuse testified before the California

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<sup>8</sup> Dr. Dietzen testified:

“8. I started treating Brittany Roberts in 2011. She was struggling with abuse issues, including having concentration problems, intrusive thoughts, and flashbacks. She was also experiencing confusion about her sexuality. She had experienced intimacy problems with her husband that had caused their divorce. Things came ‘to a head’ for her, and was a turning point when she realized she was not attracted to him. She had not previously experienced difficulty in relationships with boys. In fact, when she was in counseling with Kelly Peck, she did not have a significant intimate relationship.

“9. Brittany also was experiencing issues at work related to being told what to do, i.e., ‘being controlled.’ She related this to the abuse by Horsley who she felt controlled her. Many child sexual abuse survivors struggle in the work place with accepting authority because it triggers their sense of a lack of control they had during the abuse. This can impede workplace success and interpersonal difficulties.

“10. It is increasingly recognized that spirituality can have a major buffering effect on traumas such as sexual assault. For example, in a recent study, Gall (2006) explored the role of spirituality and coping with life stress among adult survivors of childhood sexual abuse. Results indicate that spirituality in combination with other variables (demographics, abuse descriptors, cognitive appraisal and social support) predicted anxious, angry and depressive mood. Because Brittany was abused by a church leader, and because she was blamed for her abuse by church leaders, she has experienced spirituality as a negative rather than a positive experience.

“11. Over the course of treatment, some of Brittany’s symptoms have seemingly worsened rather than lessened. As I testified in my deposition, her test scores in the depression and anxiety scales have gone from mildly severe to moderately severe. This is common for a client in treatment because dealing with these issues is difficult and emotionally charged. However, confronting these negative emotions is a necessary step to reducing and managing the emotional impact.”



Legislature on pending changes to California's childhood sexual abuse statute of limitations:<sup>9</sup>

Child sex abuse victims suffer from many negative effects.<sup>22</sup> Researchers in various studies have found—specifically in men who were sexually abused as children—that long-term adaptation will often include sexual problems, dysfunctions or compulsions, confusion and struggles over gender and sexual identity, homophobia and confusion about sexual orientation, problems with intimacy, shame, guilt and self-blame, low self-esteem and negative self-images and increased anger. There is also an increased rate of substance abuse, a tendency to deny and de-legitimize the traumatic experience, symptoms of Post Traumatic Stress Disorder, and increased probability of fear, and depression.

Hundreds of research studies have shown conclusively that sexual abuse can alter a child's physical, emotional, cognitive and social development and impact their physical and mental health throughout his or her lifetime. A 2002 study looked at same sex twin pairs where one of the twins was sexually abused as a child and one was not.<sup>23</sup> According to the study, a person with a history of childhood sexual abuse has an increased risk of the following: major depression, suicide attempt, conduct disorders, alcohol and/or nicotine dependence, social anxiety, rape after the age of 18 years old, and, divorce.<sup>24</sup>

Typically, it takes years for the victim to suffer these negative outcomes:

**Some of the effects of sexual abuse do not become apparent until the victim is an adult and a major life event, such as marriage or birth of a child, takes place.** Therefore, a child who seemed unharmed by childhood abuse can develop crippling symptoms years later. . . .<sup>25</sup>

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<sup>9</sup> Professor Hamilton of the Cardozo School of Law, Yeshiva University, is the author of *Justice Denied: What America Must Do To Protect Its Children* (Cambridge University Press 2008, 2012) and the leading expert on the history and constitutionality of retroactive statutes of limitations with respect to child sex abuse. *Id.*

<sup>22</sup> Elliot Nelson et. al., *Association Between Self-reported Childhood Sexual Abuse and Adverse Psychosocial Outcomes: Results From a Twin Study*, 59(2) ARCHIVES OF GENERAL PSYCHIATRY, 139, 139-45 (2002). 23 Id. at 139-44.

<sup>23</sup> Id. at 139-44.

<sup>24</sup> Id. at 142.

<sup>25</sup> Mic Hunter, Psy.D., *Abused Boys*, 59 (1991).

Marcia A. Hamilton, Testimony Re: California Senate Bill 131 to amend Section 340.1 of Cal. Code Civ. P. (March 4, 2013), <http://sol-reform.com/California/HamiltonCASB131testimony3413.pdf> (emphasis added), attached as Appendix B. See also Dr. Brett C. Trowbridge, Ph.D., J.D., *The Admissibility of Expert Testimony in Washington on Post Traumatic Stress Disorder and Related Trauma Syndromes: Avoiding the Battle of the Experts by Restoring the Use of Objective Psychological Testimony in the Court*, 27 Seattle U. L. Rev. 453, 460 (2003);<sup>10</sup> Kaarin Long, Caroline Palmer, Sara G. Thome, *A Distinction Without A Difference: Why the Minnesota Supreme Court Should Overrule Its Precedent Precluding the Admission of Helpful Expert Testimony in Adult Victim Sexual Assault Cases*, 31 Hamline J. Pub. L. & Pol'y 569, 606

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<sup>10</sup> “‘Interpersonal stressors’ such as childhood sexual or physical abuse, rape, or domestic battering can cause a wide constellation of symptoms in conjunction with PTSD, especially when the abuse is prolonged and repeated. PTSD symptoms often overlap with the diagnostic criteria for several other disorders, including depression, panic disorder, phobias, and obsessive-compulsive disorder. Epidemiological studies have found that 62% to 88% of those with PTSD meet criteria for at least one other disorder.” (Footnotes omitted.)

(2010);<sup>11</sup> Chrissie F. Garza, *Adult Survivors of Childhood Sexual Abuse Seeking Compensation from Their Abusers: Are Illinois Courts Fairly Applying the Discovery Rule to All Victims?*, 23 N. Ill. U. L. Rev. 317, 319-20 (2003).

**2. Roberts' Injuries Were Not Present Or Discussed In 2005-06.**

The essence of Horsley's argument is that Roberts knew enough to sue in 2006 because she was aware of the abuse and had connected her emotional difficulties to the abuse. "In 2005 and 2006, during her counseling with Kelly Peck, Roberts connected her injuries with the childhood abuse she suffered." CP 36, p. 229. But Roberts could not have sued Horsley for her current injuries in 2006 because she was not in a position where the damaging effects of the abuse would be apparent. In

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<sup>11</sup> "Symptoms vary, and may manifest months or years after a traumatic event, but in general diagnosis depends upon the 'recurrent experiencing of the traumatic memory,' 'avoidance of the traumatic memory' (including fragmentation of memory and inability to recall key aspects of the traumatic event), and 'heightened anxiety' that results in 'impaired functioning in a major life domain' for more than a month before a diagnosis can be made. It is also crucial to note:

[m]atching distress symptoms to illness labels, like all diagnostic processes, relies on the process of prototype matching . . . Often, however, the presentation of illnesses or conditions is not prototypic (i.e., not like the textbook), thereby complicating the diagnostic process. Moreover, mental health conditions are more likely than physical problems to have ambiguous characteristics that affect the boundaries of illness prototype.

"PTSD is not easy to diagnose, and it may not explain all of the symptoms experienced by individuals in distress.

"... PTSD symptoms may not manifest as expected, are complicated by other symptoms (co-morbid or not), or may simply not add up to a PTSD diagnosis ..." *Id.* 31 Hamline J. Pub. L. & Pol'y at 603-05 (footnotes omitted).

2006, Roberts had never been in a dating relationship or had a job. The more severe reactions to the abuse developed when she began a sexual relationship with her boyfriend, who became her husband, and secured employment as an adult.

Horsley's contention comes dangerously close to being a reprise of *Raymond v. Ingram*, a case explicitly overruled by both the Washington Supreme Court and Division One of this Court. *See Raymond*, 47 Wn. App. at 787 ("Raymond admitted that, before she had therapy, she remembered the assaults and realized that as a child she had mental anguish associated with the sexual abuse. Before her therapy, she also had memories of the events giving rise to her cause of action and of some injury associated with those events.") Roberts' case demonstrates a Catch-22 that victims of childhood sexual abuse face. If she had sued Horsley in 2006, she would have had a much harder time proving damages for future sexual dysfunction and marital stress because at that time she was not in a romantic relationship and had not engaged in sexual relations with anyone since the abuse. Neither Roberts nor a jury could predict in 2006 how the effects of the abuse would play out in her adult life. However, now that more serious reactions to the abuse have manifested, Roberts faces dismissal of her claims on the grounds that the statute of limitations has run.

In effect, dismissal on limitations grounds would penalize Roberts for working with a counselor immediately after the abuse ended by allowing Horsley to avoid liability by claiming any injury relating to a broad panoply of problems<sup>12</sup> was something previously diagnosed and connected to the abuse. For example, Horsley characterize Roberts' comments to Kelly Peck in 2006 that she "struggles with her relationships with boys and mixed feelings towards sex" as the same injury as Roberts' sexual problems with her husband, which resulted in a failed marriage. If Horsley's argument stands, victims of abuse would be better served by waiting to seek counseling for sexual abuse until they are adults and have manifested what they perceive to be the most serious reactions to the abuse. This result is obviously absurd and contradicts the Legislature's primary concern of providing "a broad avenue of redress for victims of childhood sexual abuse who too often were left without a remedy under previous statutes of limitation." *C.J.C.*, at 712.

The most analogous case to Roberts' circumstances is *Hollman v. Corcoran*, 89 Wn. App. 323, 949 P.2d 386 (1997). There, the Court determined the childhood sexual abuse statute of limitations permits

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<sup>12</sup> In 2005, Roberts recognized that she had problems with stress, anxiety, depression, anger, feelings of betrayal, shame, guilt, worry, insomnia, nightmares, poor concentration and poor memory, feelings of worthlessness, memories of the abuse triggered by smells, problems with sexuality and interpersonal relationships, self-esteem, embarrassment, and reliving the trauma. CP 34, pp. 175-176; CP 33, Ex. 2, pp. 147, 149.

lawsuits to be filed within three years from when the victim realizes more serious injury or discovers the causal connection between the injury and abuse, even where the victim knew he had been abused and was aware of some injury. *Id.* at 332-34. Hollman began experiencing significant problems in his work and adult personal relationships as a result of childhood sexual abuse. *Id.* at 327. Feelings of extreme depression and self-hatred resurfaced when his second son was born. *Id.*

Hollmann worked with a counselor at a mental health center (Linda Battello) for approximately 20 sessions. *Id.* at 328. He disclosed to Battello during an intake evaluation that “he had had sexual contact with an adult male that made him feel extremely guilty” and disclosed additional information about this “inappropriate sexual contact” during the sessions. *Id.* But the counseling “did not explore the causal relationship between Mr. Hollmann’s emotional and psychological injuries and Mr. Corcoran’s sexual abuse.” *Id.*

Approximately four years after working with the first counselor, Hollmann met with a second therapist, Dr. Glen Frese, for a psychological evaluation following a work related injury. In these sessions, Hollmann began to understand that Corcoran was the person responsible for some of his emotional and psychological injuries. *Id.* at 329. Hollmann received another diagnosis of PTSD from Dr. Frese. *Id.*

The trial court dismissed the claim as barred by the statute of limitations. *Id.* at 330. The Court of Appeals reversed: “The statute of limitations is tolled until the victim of childhood sexual abuse in fact discovers the causal connection between the defendant's act and the injuries for which the claim is brought.” *Id.* at 334. The Court also addressed the trial court’s concern that allowing the claim to move forward would eviscerate the statute of limitations:

The trial court reasoned that if RCW 4.16.340(1)(c) applied to every case involving childhood sexual abuse, (1)(b) would be rendered meaningless because the statute of limitations date would always be controlled by the claimant and the date he or she claims to have discovered the injury. This reasoning fails to appreciate the difference between the two sections. Section (1)(b) addresses repressed memory claims where the victim discovers his or her injury or condition was caused by a previously undiscovered act. In view of the subjective nature of repressed memory claims, it is understandable that a constructive discovery element might be imposed for such cases. Section (1)(c), on the other hand, refers to the discovery of the causal connection between a known act and **subsequent injuries including injuries that develop years later.**

*Id.* at 334 (emphasis added). Though defendant Corcoran had argued Hollmann became aware of his injuries during his initial counseling, the Court concluded a jury must determine when Hollmann connected the injuries involved in the lawsuit to sexual abuse:

[A] jury could find Mr. Hollmann did not discover the connection between his sexual abuse and his injuries until he began treatment with Dr. Frese in 1993. While Ms. Battello

made an initial diagnosis of PTSD as early as 1989, a jury could find Mr. Hollmann did not relate this diagnosis to Mr. Corcoran's abuse.

*Id.* Likewise, Roberts' discovery of her claim is a factual question for the jury, incapable of resolution on summary judgment.

While *Hollmann* dealt with a victim who had not previously made a causal connection to sexual abuse, it is instructive on several points. First, as consistently proven by the research, *Hollman* demonstrates that even when working diligently with a counselor, a victim may not be capable of understanding the extent of the damage caused by the abuse. For Hollmann, the birth of his son triggered feelings of extreme depression and self-hatred to resurface; for Roberts, the extent of her emotional injuries became apparent when she was not able to enjoy a sexual relationship or maintain intimacy with her husband during her marriage and she began to experience terrible intrusive effects at work and elsewhere. Second, Hollman's initial diagnosis of PTSD did not preclude him from later bringing a claim for injuries that also came within the scope of PTSD. The same is true here. The Superior Court erred in dismissing Roberts' claim as a matter of law.



**3. Discovery of Childhood Sexual Abuse For Purposes of The Statute of Limitations Is A Question Of Fact For the Jury.**

Courts across the country treat delayed discovery of childhood sexual abuse (CSA) as a jury question, and specifically in cases where the victim recalls the physical abuse but there is a delay in connecting psychological injuries or conditions. Recently, in *Clarke v. Abate*, --- A.3d ----, 2013 WL 4034238 (S. Ct. Vermont, Aug. 9, 2013), the Vermont Supreme Court confirmed that discovery of a childhood sexual abuse claim is a factual question for the jury, and reversed the trial court's ruling that the action was barred by Vermont's statute of limitations, which is similar to Washington's.<sup>13</sup> Plaintiff, a patient of the defendant orthopedic surgeon from September 2000 (just before her 16<sup>th</sup> birthday) until August 2002, was abused by defendant during treatment. Almost 5 years later, in June 2007, when plaintiff was 22, defendant was criminally charged with sexually assaulting another patient. After learning this highly-publicized information, plaintiff responded to a police request for former patients to provided related information. She then filed a civil suit against defendant on June 4, 2009, when she was 24.

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<sup>13</sup> *Id.* at ¶10 (citing *Riley v. Presnell*, 565 N.E.2d 780, 787 (Mass.1991) (childhood sexual abuse case, noting "majority of jurisdictions" hold "that factual disputes concerning when a plaintiff knew or should have known of his cause of action are to be resolved by the jury"))).

The trial court granted summary judgment dismissal based on the statute of limitations, relying primarily on plaintiff's statements to the police in 2007 and her 2011 deposition testimony concerning her awareness of defendant's wrongful conduct at the time of the alleged assaults. The Supreme Court held the issue should have gone to the jury. *Id.*, ¶¶1-12. "Given plaintiff's at times equivocating and conflicting statements to the authorities concerning her knowledge and awareness of any wrongful conduct on defendant's part, it was the jury's prerogative to make any inferences from those statements and determine at what point plaintiff knew or should have known that defendant's conduct was assaultive rather than medical in nature." *Id.* at ¶¶15, 19, 25, 28 (whether plaintiff knew or should have known of the wrongfulness of defendant's conduct "was the ultimate factual question for the jury to resolve in determining whether the statute of limitations had run", inappropriate for summary judgment). The court (rather than the jury) may determine the accrual date issue **only** "when there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party on that issue." *Id.* at ¶10. That is not the case here or in most childhood sexual abuse delayed-discovery actions in the summary judgment stage.

Previously, in *Earle v. State*, 170 Vt. 183, 188-94, 743 A.2d 1101, 1104-08 (1999), the same court followed Washington's lead in

interpreting RCW 4.16.340 in *Hollmann*. In *Earle*, plaintiff alleged he was sexually abused by a foster child receiving care in his home. Plaintiff reported the sexual abuse to his mother in December 1980, when he was 5, and she reported to the defendant Department of Social and Rehabilitation Services (“SRS”). In April 1982, plaintiff (then 7) told his mother he was still being abused by the boy. The mother again reported to SRS, and the boy was removed from the home in September 1982.

The victim had a troubled childhood, attempted suicide in 1984, 1988 or 1989, and was diagnosed with PTSD in 1987 (when he was 12), as well as a conduct disorder, major depression, and suicidal ideation. He was in juvenile delinquency proceedings in 1991. He filed a complaint against SRS on October 24, 1995, when he was 20, alleging breach of duty to prevent the sexual abuse and failure to intervene once the abuse was reported. The trial court dismissed the action on summary judgment under the personal injury statute of limitations.

The Vermont Supreme Court reversed, holding the retroactive portion of the state’s 6-year statute of limitations for childhood sexual abuse applied. The Court concluded there was an undetermined issue of fact as to what specific injury or condition plaintiff alleged as the basis for SRS’s liability and when he discovered that injury or condition was caused by the childhood sexual abuse. *Id.* at 191. The Court looked to

Washington's similar statute and its legislative history, noting that in Washington:

The legislature further stated that its intent was to provide for situations **where the victim may be unable to understand or make the connection between childhood sexual abuse and emotional harm until many years after the abuse and those where victims who are aware of some childhood sexual abuse discover serious injuries many years later.** See *Hollmann v. Corcoran*, 89 Wn. App. 323, 949 P.2d 386, 391 (1997) (reviewing legislative history). In *Hollmann*, the court concluded that subsection (c) addressed the claims of victims who are unable to connect the abuse and injuries experienced many years later and analogized those cases to the standard for actual knowledge under medical negligence statutes. See *id.* at 392. The court therefore held that the statute of limitations was tolled until the victim of childhood sexual abuse "in fact discovers the causal connection between the defendant's act and the injuries for which the claim is brought." *Id.*

*Id.* at 189-90 (emphasis added). The Court also cited California's statute, which "takes into account the fact that the psychological effects of abuse and even the memory of the abuse and perpetrator may be more difficult to discover than the fact that some sort of abuse occurred, precisely because the victims are children and because the traumatic events may disrupt memory function and cognition." *Id.* at 188.<sup>14</sup>

Since 1999, a plethora of additional research confirms and expands these findings, which courts continue to rely on. For example, in *R.L. v.*

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<sup>14</sup> (Citing J.L. Herman, *Trauma and Recovery* 34 (1992); A. Rosenfeld, *The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy*, 12 Harv. Women's L.J. 206, 208-09 (1989); E. Sue Blume, *The Walking Wounded: Post-Incest Syndrome*, 15 SIECUS Rep. 5 (1986)).

*Voytac*, 199 N.J. 285, 301-02, 971 A.2d 1074, 1083-84 (2009), the New Jersey Supreme Court described the “full array of credible evidence to assist the court in its determination” whether a plaintiff has filed within the statute of limitations:

That evidence may include empirical evidence as well as testimony from experts. For example, some advocate that a child subjected to incestuous abuse by a father or close male the “empirical evidence as well as testimony from experts. For example, some advocate that a child subjected to incestuous abuse by a father or close male relative may suffer from Post-Traumatic Stress Disorder symptoms such as avoidance and denial, similar to those suffered by war veterans. That is, the victim may understand that he or she has psychological problems, but the syndrome impedes the recognition of the nature and extent of the injuries suffered, either because the victim has completely repressed memory of the abuse or because the memories are too painful to confront directly. *See* Anderson B. Rowan & David W. Fay, *Post Traumatic Stress Disorder in Child Sexual Abuse Survivors: A Literature Review*, 6 *J. of Traumatic Stress* 3 (1993); Mary L. Paine & David J. Hansen, *Factors Influencing Child to Self-Disclose Sexual Abuse*, 22 *Clinical Psychology Rev.* 271-95 (2001); *see also* David M. Fergusson & Paul E. Mullen, *Childhood Sexual Abuse: An Evidence Based Perspective* 67 (1999); David M. Fergusson & Paul E. Mullen, *Childhood Sexual Abuse and Psychiatric Disorder in Young Adulthood*, 35 *J. of Am. Acad. of Child & Adolescent Psychiatry* 1355-64 (1996); Jody Messler Davies & Mary Gail Frawley, *Treating the Adult Survivor of Childhood Sexual Abuse: A Psychoanalytic Perspective* 62-85 (1994).

An expert may also offer the opinion that plaintiff's inability to connect the abuse and his injuries was related to the individual characteristics of plaintiff.

In *Earle*, the Court noted the boundaries of the discovery rule in cases of additional or new injuries:

Normally, a plaintiff cannot claim that an additional limitations period is inaugurated when additional injuries arising from the same incident are discovered later. ... [A]ny plaintiff attempting to bring more than one claim for damages caused by the same instances of sexual abuse would generally have to show why the cause had not already accrued. But the plain language of the retroactivity provision ... directs us to **consider the date when such abuse was linked to a psychological effect as an event that may bring a case within the retroactive application of the statute.**

*Id.* at 190 (emphasis added).

The Court expressly rejected defendant's argument "that delayed psychological trauma deriving from a childhood sexual assault is not a distinct 'injury or condition'", as that "would render meaningless the text of the retroactivity provision". *Id.* at 190. The provision "anticipates that the immediate and long-term effects of a child sexual assault will be **distinct occurrences.**" *Id.* at 191 (emphasis added).<sup>15</sup> Likewise, here, Roberts' discovery that the difficulties arising around the time of her marriage, work, and adulthood were related to the sexual abuse is a distinct injury not known or discoverable as a single, non-working person in 2005-06.

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<sup>15</sup> The proper question in *Earle* was whether plaintiff discovered his injury or condition was caused by sexual abuse after July 1, 1984. The facts alleged allowed for this possibility, including his late-1984 suicide attempt, PTSD in 1987, and further suicide attempts. *Id.* at 193. As in *Earle*, whether Roberts' discovered her new injuries within the statute of limitations, that is, after January 2009, is a jury question.

In *Dunlea v. Dappen*, 83 Haw. 28, 34-36, 924 P.2d 196, 202-04 (1996),<sup>16</sup> the court joined previous jurisdictions holding that when a plaintiff discovered, or reasonably should have discovered, she was psychologically injured by childhood sexual abuse “is a question of fact for the jury”, under statutory or judicially-created discovery rules. *Id.* at 202. For an example of a statutory childhood sexual abuse discovery rule, the *Dunlea* Court cited *Sellery v. Cressey*, 48 Cal. App. 4<sup>th</sup> 538, 55 Cal.Rptr.2d 706 (1996). In *Sellery*, plaintiff Laura sued her parents for CSA in August 1992, when she was 37, claiming she first saw the connection between her psychological ailments and the childhood abuse when she entered therapy in 1991 for treatment of depression, dissociation, and sexual dysfunction. Her experts testified that dissociation of the childhood trauma made her unable to truly appreciate the significance of her experience, remembering it instead in unconnected segments. *Id.* at 543, 547.

The Court held the action was timely, rejecting the argument that the statute started running in 1984 when Laura’s psychological problems began to surface. *Id.* at 547. The expert testimony created a triable issue of fact as to when Laura should have discovered the connection between her abuse and injuries, making summary judgment improper. *Id.* See also

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<sup>16</sup> Overruled on other grounds, *Hac v. Univ. of Hawaii*, 102 Haw. 92, 73 P.3d 46 (2003).

*Shirley v. Reif*, 260 Kan. 514, 920 P.2d 405 (1996) (applying Kansas childhood sexual abuse statute to reverse summary judgment because whether plaintiffs discovered that their injuries were caused by abuse outside the 3-year period was factual issue for jury); *Werre v. David*, 275 Mont. 376, 913 P.2d 625 (1996) (under Montana statute, when plaintiff discovered connection between her sexual abuse and mental disorders was factual jury question); *L.M.S. v. N.M. and V.P.*, 911 S.W.2d 703 (Mo.Ct.App.1995) (under Missouri statute, dismissal of plaintiff's childhood sexual abuse claim was error because, viewing allegations in plaintiff's favor, her damage may not have been ascertainable within limitations period); *McCreary v. Weast*, 971 P.2d 974, 981 (Wyo. 1999) ("If the trial court or the jury is satisfied that psychic trauma has been proximately caused by a sexual assault upon a minor, and medical science could not recognize that trauma, **or its final consequences could not be forecast**, the period of limitations described in the statute does not begin to run until the damage is identified.")<sup>17</sup>

As examples applying judicially-created discovery rules, *Dunlea* cited *Hammer v. Hammer*, 142 Wis.2d 257, 418 N.W.2d 23 (Ct.App.

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<sup>17</sup> The factual question for the jury in that case was "when Weast discovered or in the exercise of reasonable diligence should have discovered the psychic trauma." *Id.* In instructing the jury, the court held that the trial judge "should make clear the proposition that the statute of limitations for Weast's claim for psychic damages would not start until the discovery of those damages, even though the discovery of the physical damages occurred at an earlier date." *Id.*



1987), where plaintiff, at age 15, reported to her mother that her father had sexually abused her in secret since she was 5 (in 1969). She began to consider the relationship between his acts and her continuing psychological and emotional problems in February 1985, and then sought counseling and legal advice. Her expert testified that she developed denial and suppression coping mechanisms as a “normal post-traumatic stress reaction”. *Id.* at 25. Her family minimized the abuse and its effect and blamed the daughter for the family’s breakup, which intensified these coping mechanisms.

The expert testified that plaintiff’s psychological manifestations were “the usually recognized symptoms of post-traumatic stress disorder in victims of intrafamilial sexual abuse.” *Id.* at 25. The father contended plaintiff should have discovered her claim when she was 15. *Id.* at 27. The Court rejected this, because “a cause of action does not necessarily accrue when the first manifestations of injury occur. **The claimant has leeway to not start an action until she knows more about the injury and its probable cause.**” *Id.* at 27 (emphasis added). Reversing summary judgment, the Court applied the discovery rule and declined to “decide the factual question of when [plaintiff] discovered or should have discovered her injuries and their cause. ... [B]ecause genuine issues of

material fact remain open, including when [plaintiff's] cause of action accrued, we reverse and remand this matter for trial." *Id.* at 27.

In *Osland v. Osland*, 442 N.W.2d 907 (N.D.1989), the defendant-father appealed from a damages award to plaintiff-daughter for childhood sexual abuse, based on the limitations defense. The trial court had ruled that, because the daughter had suffered "severe emotional trauma" from the sexual abuse" and she "was not able to fully understand or discover her cause of action during the applicable statutory time period[.]" the statute of limitations was tolled until she reasonably discovered a claim existed. *Id.* at 908-09. The *Osland* Court stated that the determination of when a plaintiff discovered or should have discovered her cause of action was "a fact question which, when made by the trial court, will not be set aside on appeal unless clearly erroneous." *Id.* at 909.

The trial court found that the severe emotional trauma experienced by [the plaintiff-daughter] resulted in her being unable to fully understand or discover her cause of action during the applicable statutory limitations period. Having reviewed the record, we cannot conclude that the trial court's finding in this regard [was] clearly erroneous.

*Id.* at 909. See also *Doe v. LaBrosse*, 588 A.2d 605, 607 (R.I. 1991) (remanding for evidentiary hearing to "determine the date that the [34- and 35-year old] plaintiffs discovered, or with all due diligence should reasonably have discovered, the causal connection between the defendant's

alleged acts [of incest] and the plaintiffs' alleged injuries”); *Hildebrand v. Hildebrand*, 736 F.Supp. 1512, 1523 (S.D.Ind. 1990) (denying defendant's motion for summary judgment on childhood sexual abuse claim because, construing inferences in plaintiff's favor, “[t]his court cannot conclude as a matter of law that [plaintiff] ascertained her injuries back in the early 1980's; whether she did or should have ascertained her injuries is a question to be resolved by the jury.”); *McCollum v. D'Arcy*, 638 A.2d 797 (N.H. 1994) (discovery rule tolled a 50-year-old daughter's claim of sexual abuse against her parents despite the lack of corroborating evidence).

**4. There Is A National Trend Toward Repealing Or Further Expanding Statute Of Limitations For Childhood Sexual Abuse Cases.**

As the Vermont Supreme Court recognized 14 years ago, “Legislatures in other states have enacted statutes of limitations indicating a similar awareness of the difficulties faced by survivors of child sexual abuse.” *Earle*, at 189 (citing California statute). Reform is actively ongoing in this area. Maine and three other states have completely abandoned statutes of limitation for childhood sexual abuse.<sup>18</sup> Proposed

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<sup>18</sup> [http://sol-reform.com/SNAPSHOT\\_OF\\_SOL\\_STATUTES\\_AND\\_2013\\_PENDING\\_BILLS\\_ACROSS\\_THE\\_US.pdf](http://sol-reform.com/SNAPSHOT_OF_SOL_STATUTES_AND_2013_PENDING_BILLS_ACROSS_THE_US.pdf) (attached as Appendix C): (“**No Civil Statute of Limitations for Child Sex Abuse:** Alaska - none for felony sex abuse/assault of minor, felony exploitation of minor; Connecticut - none if events forming the civil claim led to conviction of first-degree aggravated sexual or sexual assault; Delaware - none as to perpetrator, or as to gross negligence against employer; Florida - none for sexual batteries committed against victims

reforms are in progress in many states. In April 2013, Washington Legislature passed HB1352 and SB 5100, extending the statute of limitations in child sex crimes until the victim turns 30 (amending RCW 9A.04.080). In California, legislation is under consideration to prospectively eliminate the limitations period for civil actions by minor victims of sexual offenses, extend for 30 years some previously lapsed claims, and revive for one year all other actions as to which the statute had previously lapsed. Cal. SB 131 (introduced Jan. 24, 2013), <http://sol-reform.com/California/HamiltonCASB131testimony3413.pdf> (March 4, 2013 testimony of Marcia Hamilton, Cardozo Law School). Appendix C.

## V. CONCLUSION

The Superior Court erred in dismissing, as a matter of law on summary judgment, Roberts' claim against Horsley for sexually abusing her as a child. Roberts submitted ample evidence and testimony demonstrating genuine issues of material fact for the jury as to when she

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under 16 years old; Maine – none; Minnesota – none for victims abused under age of 18; Guam - none for sex crimes against those under the age of 18”); [http://www.corsal.org/index.php?option=com\\_content&view=article&id=16](http://www.corsal.org/index.php?option=com_content&view=article&id=16) (31 states have no statutes of limitations for some or all sex crimes; Four states have eliminated civil statutes of limitations entirely; Florida State Legislature voted, unanimously, in both branches, to eliminate statutes of limitations for criminal prosecutions and civil suits relating to childhood sexual abuse; Maine has eliminated statutes of limitations, both civil and criminal, by legislative actions; 26 states have civil statutes of limitations which recognize delayed discovery of childhood sexual abuse claims and 3 additional states do so by court decision; 41 states have extended statutes of limitations when child sexual abuse is involved).

discovered her injuries as an adult who was abused by Horsley during childhood. The Washington Legislature intended RCW 4.16.340(1)(c) to cover exactly this type of claim. Roberts respectfully asks the Court to reverse the grant of summary judgment and remand this case for trial.

DATED this 23<sup>rd</sup> day of September, 2013.

SCHROETER, GOLDMARK & BENDER

A handwritten signature in black ink, appearing to be 'Rebecca J. Roe', written over a horizontal line.

REBECCA J. ROE, WSBA #7560

M. LORENA GONZALEZ, WSBA# 37057

CERTIFICATE OF SERVICE


I certify that I served a copy of the *Brief of Appellant* upon all parties of record on the 23<sup>rd</sup> day of September, 2013, via email and via ABC Legal Messenger as follows:

Gary A. Trabolsi, WSBA #13215  
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Attorney for Respondents Suzanne & Frederick Horsley

I certify under penalty under the alws of the State of Washington that the foregoing is true and correct.

DATED this 23<sup>rd</sup> day of September, 2013.

  
\_\_\_\_\_  
Darla Moran  
Legal Assistant

## APPENDICES

- Appendix A - House Bill Report, HB 2058, Reported by House Committee on: Judiciary, March 6, 1991
- Appendix B - Marcia A. Hamilton, Testimony Re: California Senate Bill 131 to amend Section 340.1 of Cal. Code Civ. P. (March 4, 2013), <http://sol-reform.com/California/HamiltonCASB131testimony3413.pdf>
- Appendix C - Cal. SB 131 (introduced Jan. 24, 2013), <http://sol-reform.com/California/HamiltonCASB131testimony3413.pdf> (March 4, 2013 testimony of Marcia Hamilton, Cardozo Law School).

# APPENDIX A

# APPENDIX A



# HOUSE BILL REPORT

## ESHB 2058

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*As Passed Legislature*

**Title:** An act relating to application of the statute of limitations to actions based on childhood sexual abuse.

**Brief Description:** Clarifying the application of the statute of limitations to actions based on childhood sexual abuse.

**Sponsor(s):** By House Committee on Judiciary (originally sponsored by Representatives Scott, Riley, Paris, H. Myers, Miller, Forner, Belcher, Ludwig, Inslee, Wineberry, Locke, Appelwick, Holland, Roland, Winsley, D. Sommers, Morris, Spanel, R. Johnson and Rasmussen).

**Brief History:**

Reported by House Committee on:  
Judiciary, March 6, 1991, DPS;  
Passed House, March 19, 1991, 98-0;  
Amended by Senate;  
House concurred;  
Passed Legislature, 95-0.

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**HOUSE COMMITTEE ON  
JUDICIARY**

**Majority Report:** *That Substitute House Bill No. 2058 be substituted therefor, and the substitute bill do pass.*  
Signed by 17 members: Representatives Appelwick, Chair; Ludwig, Vice Chair; Paris, Assistant Ranking Minority Member; Belcher; Broback; Forner; Hargrove; Inslee; R. Meyers; Mielke; H. Myers; Riley; Scott; D. Sommers; Tate; Vance; and Wineberry.

**Minority Report:** *Do not pass.* Signed by 2 members: Representatives Padden, Ranking Minority Member; and Locke.

**Staff:** Pat Shelledy (786-7149).

**Background:** In the 1988 legislative session, the Legislature enacted a statute that extended the statute of limitations for civil actions for damages for injury suffered from childhood sexual abuse to three years from the commission of the act or three years of the time the victim discovered or reasonably should have discovered the injury or the condition was caused by the sexual abuse. The three years only begins to run once the victim turns age 18. The

Legislature passed this statute of limitations following the Washington Supreme Court case in Tyson v. Tyson, which held that the discovery rule, which tolls the statute of limitations until the plaintiff discovers or reasonably should have discovered a cause of action, did not apply in intentional torts when the victim has blocked the incident from memory for the entire time of the statute of limitations.

In addition to the cases in which a victim may suffer injuries, but does not know that the sexual abuse caused the injury due to suppressed memory of the sexual abuse, a victim may remember the sexual abuse but may have a delayed reaction to the abuse and begin to experience significant suffering from the abuse later in life. A victim may have experienced some trauma from the abuse at the time it was occurring, but either was a child at the time, or the trauma was not significant enough to prompt the victim to sue. For example, a child may have experienced stomachaches and nightmares at the time the sexual abuse was occurring, but the victim chooses not to sue for that injury within three years after the victim turns age 18. The victim may have a much more severe reaction later in life, such as marital problems, sexual dysfunction, depression, suicidal tendencies, or extreme fears for safety of the victim's children from sexual abuse. At that time the victim may choose to sue for the abuse upon discovery of the injury. However, in at least one case, the court has held that because the victim was aware of the sexual abuse, and experienced at least some injury from that abuse, i.e., the stomachache, the statute of limitations expired and the victim is foreclosed from suit for the greater injury that developed later in life.

**Summary of Bill:** The Legislature finds that sexual abuse is a pervasive problem that affects the safety and well-being of many citizens. Childhood sexual abuse is traumatic, and the damage is long-lasting. Victims may not only repress the memory of the abuse for many years after the abuse occurred, but may also be unable to connect being abused with any injury until later in life. Although the victim may be aware of the sexual abuse, more serious reactions to the abuse may develop years later.

When the Legislature extended the statute of limitations for child sexual abuse cases, the Legislature intended at that time to reverse the court's ruling in Tyson v. Tyson. The Legislature also intends that the discovery of minor injuries from sexual abuse shall not trigger the statute of limitations for injuries that were not discovered or did not manifest themselves until years later.

The statute of limitations in a childhood sexual abuse civil case is extended to three years from the time that the victim discovered or reasonably should have discovered that the act caused the injury for which the claim is brought.

**Fiscal Note:** Not requested.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Testimony For:** Original Bill: Law is necessary to clarify legislative intent to extend statute of limitations in childhood sexual abuse cases. The extended statute of limitations should also exist for cases where a victim has a delayed but serious reaction to earlier abuse.

**Testimony Against:** None.

**Witnesses:** Original Bill: Deborah Senn, Northwestern Women's Law Center (pro); Dawn Larsen, Washington Coalition of Sexual Assault Programs (pro); and Mary Ault, Department of Social and Health Services (pro).

# **APPENDIX B**

# **APPENDIX B**

# CARDOZO

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

MARCI A. HAMILTON  
Paul R. Verkuil Chair in Public Law

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07

March 4, 2013

## FOR EMAIL SUBMISSION

Senator James Beall  
CA- 15<sup>th</sup> District  
Room 2068  
State Capitol, 4062  
Sacramento, CA 95814

RE: Senate Bill 131, An act to amend Section 340.1 of the Code of Civil Procedure, relating to damages (introduced January 24, 2013)

Dear Senator Beall:

I commend you and Assembly Member Skinner for the introduction of S.B. 131, which would prospectively eliminate the statute of limitations for civil actions brought by minor victims of sexual offenses, extend for thirty (30) years some previously lapsed claims, and revive for a period of one (1) year all other actions for which the statute of limitations ("SOL") had previously lapsed. Statute of limitations reform is the one tried and true means that will identify the many hidden child predators who are grooming children in California right now. **If passed, S.B. 131 will put California back in the forefront of child protection.**

With its passage and enactment of S.B. 1779 (2002 Cal. Stats. ch. 149 § 1) "An act to amend Section 340.1 of the Code of Civil Procedure, relating to damages," California initiated a national movement to create more opportunities for justice for child sex abuse victims by removing SOLs. For the calendar year 2003, over 1000 survivors of child sex abuse filed civil lawsuits and alerted the public to the identities of over 300 child predators previously unidentified. This was a huge improvement in child safety in California, but once the window closed, the existing statutes of limitations blocked many survivors from going forward. I heard from numerous Buddhist and family abuse survivors in the years following, who had missed the window and were finally ready, but who's SOLs had expired.

Thus, despite the 2003 one-year window, there are still untold numbers of hidden child predators in California who are preying on one child after another, because the statutes of limitations as currently configured favor predators over child protection. This bill reduces the present danger to California's children. Given that most child perpetrators abuse many children over the course of their lives,<sup>1</sup> window legislation does far more than create justice for victims in the past. It also forestalls future abuse of today's children.

**This bill is a sunshine law for children.** There is an epidemic of child sex abuse around the world. At least one in four girls is sexually abused and about one in five boys. Sadly, 90% never go to the authorities and the vast majority of claims expire before the victims are capable of getting to court. Most victims are abused by family or family acquaintances. This bill would protect the children of California by making it possible for victims to come forward and identify their perpetrators in a court of law. It would also bring delayed, but still welcome, justice to these victims.

By way of introduction, I hold the Paul R. Verkuil Chair in Public Law at the Benjamin N. Cardozo School of Law, Yeshiva University, where I specialize in church/state relations and constitutional law. My recent book, *Justice Denied: What America Must Do to Protect Its Children* (Cambridge University Press 2008, 2012), makes the case for statute of limitations reform in the child sex abuse arena. I am the leading expert on the history and constitutionality of retroactive statutes of limitations with respect to child sex abuse and have advised many child sex abuse victims on constitutional issues, and testified in numerous states where SOL reform is being considered. I also track the SOL movement in all 50 states on my website, [www.sol-reform.com](http://www.sol-reform.com)

**There are three compelling public purposes served by window legislation and the removal of SOLs into the future:**

- (1) It identifies previously unknown child predators to the public so children will not be abused in the future;**
- (2) It gives child sex abuse survivors a fair chance at justice; and**
- (3) It cures the injustice wreaked by the current unfairly short statute of limitations that protect child predators and silence child sex abuse victims.**

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<sup>1</sup> KENNETH V. LANNING, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS 10, 52 (5<sup>th</sup> ed. 2010) available at [http://www.cybertipline.com/en\\_US/publications/NC70.pdf](http://www.cybertipline.com/en_US/publications/NC70.pdf). ("Except for child prostitution, most sexual-exploitation-of-children cases in the United States involve acquaintance molesters who rarely use physical force on their victims. . . . Although a variety of individuals sexually abuse children, preferential-type sex offenders, and especially pedophiles, are the primary acquaintance sexual exploiters of children. A preferential-acquaintance child molester might molest 10, 50, hundreds, or even thousands of children in a lifetime, depending on the offender and how broadly or narrowly child molestation is defined. Although pedophiles vary greatly, their sexual behavior is repetitive and highly predictable.").

I have been involved in statute of limitations reform in numerous states. This is the only tried and true method of identifying the many hidden child predators. As Professor Timothy Lytton has documented, civil tort claims have been the only means by which survivors of clergy abuse have been able to obtain any justice. Timothy Lytton, *Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Sexual Abuse* (Harvard University Press, 2008).

**This is a vibrant national movement to protect our children.** Legislative reform for statutes of limitations for child sex abuse victims is on the rise. Hawaii enacted a 2-year window, which went into effect in April 2012.<sup>2</sup> Guam's bill removing the statute of limitations and creating a two-year window was signed into law by Governor Calvo on March 10, 2011.<sup>3</sup> Delaware eliminated both the civil and criminal SOLs and enacted a two-year window, from July 2007 to 2009.<sup>4</sup> Virginia<sup>5</sup> also enacted legislation extending its civil statutes of limitations in 2011, while Florida eliminated the statute of limitations for sexual battery of a child in 2010.<sup>6</sup> Florida, Guam and Delaware thus join Alaska,<sup>7</sup> Connecticut<sup>8</sup> and Maine,<sup>9</sup> all of which have eliminated their civil statutes of limitations for child sex crimes.

Although the 2013 legislative session has just begun, Arkansas already has eliminated its criminal statute of limitations.<sup>10</sup> Bills that would eliminate, or create windows for, the statutes of limitations covering child sex abuse are pending in

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<sup>2</sup> Hawaii Act 068 (12), *formerly* S.B. 2588, 2012 Leg. Sess. (Haw. 2012) (enacted April 24, 2012) (extended and tolls statute of limitations for civil actions brought by minor victims of sexual offenses; *and* reviving via a civil "window" for two (2) years some actions for which the statute of limitations had previously lapsed).

<sup>3</sup> Bills No. B033 & B034-31(COR), Acts To Amend § 11306 Of Article 3, Chapter 11, Title 7 Of The Guam Code Annotated; Relative To The Statute Of Limitations For Civil Actions Involving Child Sexual Abuse, removing the statute of limitations and establishing a two-year window of opportunity for child sex abuse victims whose claims have expired under the Guam statute of limitations to bring their civil claims, now Public Laws No. 31-06 & 31-07 (2011); Erin Thompson, *Sex Abuse Bills Now Public Law*, PACIFIC DAILY NEWS (Mar. 10, 2011), *available at* <http://www.guampdn.com/article/20110310/NEWS01/103100301/Sex-abuse-bills-now-public-law>.

<sup>4</sup> DEL. CODE ANN. 10 § 8145 (a)-(b) (2007) (civil); 11 DEL. CODE ANN. 11 § 205 (criminal).

<sup>5</sup> VA. CODE ANN. § 8.01-243(D) (2011), *formerly* H.B. 1476, 2011 Gen. Assemb., 2011 Reg. Sess., (enacted) (extending the limitations period for actions for sexual abuse committed during the infancy or incapacity of the abused person from two years to 20 years from the time of the removal of the infancy or incapacity or from the time the cause of action otherwise accrues).

<sup>6</sup> FLA. STAT. ANN. § 95.11(7) (2010) (enacted) (eliminating statute of limitations for sexual battery if victim was under 16 years old, for claims not barred as of July 2010).

<sup>7</sup> ALASKA STAT. § 09.10.065 (no SOL for claims arising out of for felony sex abuse/assault of minor, felony exploitation of minor).

<sup>8</sup> CONN. GEN. STAT. § 52-577e (no SOL if events forming the civil claim led to conviction for first-degree aggravated sexual or sexual assault).

<sup>9</sup> ME. REV. STAT. ANN. tit. 14, § 752-C (1) (no SOL for any actions based on sex acts against minors).

<sup>10</sup> S.B. No. 92, 2013 Gen. Assemb., 89<sup>th</sup> Gen. Assem. (Ark. 2013) (enacted, Feb. 22, 2013) (eliminating limitation of time for bringing a criminal action with respect to child sex abuse), <http://www.arkleg.state.ar.us/assembly/2013/2013R/Bills/SB92.pdf>. See, KATV.com (ABC), *Statute of Limitation dropped on child sex crimes*, (Feb. 22, 2013), <http://www.katv.com/story/21310684/statute-of-limitation-dropped-on-child-sex-crimes>

Massachusetts,<sup>11</sup> Minnesota,<sup>12</sup> Missouri,<sup>13</sup> Nevada,<sup>14</sup> New Jersey,<sup>15</sup> Oregon,<sup>16</sup> and New York.<sup>17</sup> Bills—eliminating SOLs and creating a civil “window” were recently introduced in the Pennsylvania legislature as well.<sup>18</sup> Illinois recently extended its statute of limitations in 2010,<sup>19</sup> and now in 2013, has bills pending which would eliminate both the civil and criminal statute of limitations outright.<sup>20</sup>

Some have argued that retroactive legislation is unconstitutional. While such an implication was true in the nineteenth century, it is no longer true under the federal Constitution, as the United States Supreme Court has explained: “The presumption against statutory retroactivity had special force in the era in which courts tended to view legislative interference with property and contract rights circumspectly. In this century, legislation has come to supply the dominant means of legal ordering, and circumspection has given way to greater deference to legislative judgments.” Landgraf v. USI Film Prods., 511 U.S. 244, 272 (1994); see also Republic of Austria v. Altmann, 541 U.S. 677 (2004).

<sup>11</sup> Bill H.1455, 2013 Reg. Session, 188<sup>th</sup> Gen. Sess. Mass. Legis. (Mass. 2013) (pending) (extends limitations period for prospective claims, and creates a 1 year “window” to revive time-barred claims); Bill S.633, 2013 Reg Session, 188<sup>th</sup> Gen. Sess. Mass. Legis. (Mass. 2013) (pending) (retroactively and prospectively extending limitations period for child sex abuse).

<sup>12</sup> S.B. 534 and H.B. 681, 88<sup>th</sup> Legis., 2013-14 Reg. Sess. (Minn. 2013) (pending) (Introduced as “The Minnesota Child Victims Act, A bill for an act relating to civil actions; changing the limitation period for civil actions involving sexual abuse; amending Minnesota Statutes 2012, section 541.073); *See*, James Warden, Latz, Simon Back ‘Minnesota Child Victims Act’, GOLDEN VALLEY PATCH (Feb. 14, 2013), <http://goldenvalley.patch.com/articles/child-abuse-4ac8b5f2#video-13364104>.

<sup>13</sup> H.B. No. 247, 97<sup>th</sup> Gen Assemb., 1<sup>st</sup> Gen Sess. (Mo. 2013) (pending) (eliminating the statute of limitations in both civil and criminal actions)

<sup>14</sup> S.B. 103, 2013 Legis. 77th Reg. Sess. (Nev. 2013)(pending) (eliminating the statute of limitations in criminal actions)

<sup>15</sup> No. A.2405, 214<sup>th</sup> Legis. Sess., 2011-2012 Reg. Sess. (N.J. 2012) (pending) (eliminating civil statute of limitations for child sex abuse). A new bill, including a civil “window” in New Jersey is set to be introduced soon in the 2013 Legislative Session.

<sup>16</sup> H.B. 3284, 77th Legis. Assemb., 2013 Reg. Sess. (Or. 2013) (pending) (eliminates statute of limitations for certain sex crimes committed against minors)

<sup>17</sup> No. A01771, 235<sup>th</sup> Gen. Assemb., 2013 Reg. Sess. (N.Y. 2013) (pending) (extending the statute of limitations in criminal and civil actions for certain sex offenses committed against a child less than eighteen years of age, and creating a one year civil “window”).

<sup>18</sup> H.B. 237, 221<sup>st</sup> Gen. Assemb., 2013 Reg. Sess. (Pa. 2013) (pending) (eliminates the statute of limitations for number of enumerated criminal offenses involving child sexual abuse); H.B. 238, 221<sup>st</sup> Gen. Assemb., 2013 Reg. Sess. (Pa. 2013) (pending) (establishes civil “window” which allows any suit that was previously barred from court solely on statute of limitations grounds to commence within the two-year period).

<sup>19</sup> 735 ILL. COMP. STAT. 5/13-202.2 (2010) (enacted) (expanding statute of limitations for injury based on childhood sexual abuse to within 20 (previously 10) years of the date the limitation period begins to run or within 20 (previously 5) years of the date the person abused discovers or through the use of reasonable diligence should discover that the act of childhood sexual abuse occurred and the injury was caused by that abuse).

<sup>20</sup> H.B. No. 1063, 98<sup>th</sup> Gen. Assemb., 2013-2014 Reg. Sess. (Ill. 2013)(pending) (eliminates the criminal statute of limitations for child sex abuse); S.B. No. 1399, 98<sup>th</sup> Gen. Assemb., 2013-2014 Reg. Sess. (Ill. 2013) (eliminates the civil statute of limitations for actions arising from child sex abuse).



Further this is simply not true in California. California's previous one-year window was held to be constitutional. See Deutsch v. Masonic Homes of California, Inc., 80 Cal. Rptr. 3d 368, 378 (Cal. Ct. App. 2008). Previous California law supports the windows, as the California Supreme Court has long upheld retroactive application of a newly extended statute of limitation to revive claims that previously expired. Mudd v. McColgan, 183 P.2d 10, 13 (Cal. 1947) (holding retroactive extension of statute of limitations in tax case permissible when applied to matters not already barred by the lapse of time); Liebig v. Superior Court, 257 Cal. Rptr. 574, 577 (Ct. App. 3d 1989) (affirming constitutionality of child sexual abuse statute's revival of expired claims).

In a case decided in 2011, the Delaware Supreme Court, sitting en banc, persuasively upheld a two-year window against a due process challenge. Sheehan v. Oblates of St. Francis de Sales, 15 A.3d 1247 (Del. 2011).

Any claim that window legislation leads to bankruptcy of institutions is irresponsible. First, only two bankruptcies have followed window legislation, one in San Diego and the other in Wilmington. In both cases, the bankruptcy was a voluntary bankruptcy, which was intended to protect assets and avoid trials that would have revealed the Roman Catholic bishop's secrets regarding their role in endangering children. These bankruptcies were not filed because the dioceses were actually indigent.<sup>21</sup> In San Diego, the bankruptcy court publicly stated that the diocese was not honest about its actual wealth and that there was no justification for the bankruptcy filing. The Wilmington bankruptcy settled, and the settlement includes remuneration for victims for the Diocese's cover up of child sex abuse predators, and just as important, an agreement to release the identities of those priests who have been accused of abuse.

SOL reform has very few detractors other than the Catholic bishops, who have misleadingly argued that window legislation is unconstitutional on the theory that it "targets" the Church. Window legislation does not target any particular perpetrator or organization. Indeed, many of these victims are victims of incest, and others are victims who were subjected to abuse at universities, in day care centers, and anywhere a child can be found. A federal trial court in the Ninth Circuit persuasively upheld the first California window against such an argument. See Melanie H. v. Defendant Doe, No. 04-1596-WQH-(WMc), slip op. (S.D. Cal. Dec. 20, 2005).

Child sex abuse victims suffer from many negative effects.<sup>22</sup> Researchers in various studies have found—specifically in men who were sexually abused as children—that long-term adaptation will often include sexual problems, dysfunctions or compulsions, confusion and struggles over gender and sexual identity, homophobia and confusion about sexual orientation, problems with intimacy, shame, guilt and self-blame, low self-esteem and negative self-images and increased anger. There is also an increased

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<sup>21</sup> For a fact-based analysis of how American Catholic dioceses have dealt with their finances and their wealth, see <http://www.economist.com/node/21560536>.

<sup>22</sup> Elliot Nelson et. al., Association Between Self-reported Childhood Sexual Abuse and Adverse Psychosocial Outcomes: Results From a Twin Study, 59(2) ARCHIVES OF GENERAL PSYCHIATRY, 139, 139-45 (2002).

rate of substance abuse, a tendency to deny and de-legitimize the traumatic experience, symptoms of Post Traumatic Stress Disorder, and increased probability of fear, and depression.

Hundreds of research studies have shown conclusively that sexual abuse can alter a child's physical, emotional, cognitive and social development and impact their physical and mental health throughout his or her lifetime. A 2002 study looked at same sex twin pairs where one of the twins was sexually abused as a child and one was not.<sup>23</sup> According to the study, a person with a history of childhood sexual abuse has an increased risk of the following: major depression, suicide attempt, conduct disorders, alcohol and/or nicotine dependence, social anxiety, rape after the age of 18 years old, and, divorce.<sup>24</sup>

Typically, it takes years for the victim to suffer these negative outcomes:

Some of the effects of sexual abuse do not become apparent until the victim is an adult and a major life event, such as marriage or birth of a child, takes place. Therefore, a child who seemed unharmed by childhood abuse can develop crippling symptoms years later. . . .<sup>25</sup>

California pays the price of abuse in several ways. First, the state suffers from reduced productivity from victims, because they have been disabled by the abuse. To the extent that they are not made whole, they are producing less tax-generating income. The fact that California shuts off prosecution and civil claims before victims are ready to come forward means that many victims have no chance to achieve justice and, therefore, are more likely to suffer serious depression and illness. Second, California bears the cost of divorces, broken homes, and suffering children, which are a sadly prevalent fact in many survivors' lives. This creates a drag on local school districts that must provide counseling and guidance for troubled youth, the state agencies that deal with troubled families, and local authorities. Third, the survivors' medical bills generated by the abuse, whether psychological or physical, are likely to have to be subsidized by state and federal medical programs and funds.

California does provide for an eight-year (8) statute of limitations, but victims typically have a difficult time dealing with many issues, particularly such as repressed memories. Eight years is a very short period of time within which to process the information, obtain the needed counseling to be ready to go to court, and then to find an attorney and proceed to the judicial process. The window would help them as well as the vast majority of victims, who do not have repressed memories; but did not know about California's 2003 window and simply could not get to court before the statute of limitations expired.

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<sup>23</sup> Id. at 139-44.

<sup>24</sup> Id. at 142.

<sup>25</sup> Mic Hunter, Psy.D., *Abused Boys*, 59 (1991).

Once again, I applaud you for introducing legislation that will help childhood sexual abuse victims, and the Committee for taking up the cause of child sex abuse victims in this way. California's children deserve the passage of statutes of limitations reform to protect children today and in the future, and to achieve justice for the many victims suffering in silence. SB 131 is a huge step forward for California's children.

Please do not hesitate to contact me if you have questions regarding window legislation or if I can be of assistance in any other way.

Sincerely,

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# APPENDIX C

# APPENDIX C

# CARDOZO LAW

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## **Summary of Statutes of Limitations Reform Across the United States June 28, 2013**

- A. All 2013 Pending Child Sex Abuse Statutes of Limitations Reform Bills
- B. States with No Civil Statute of Limitations for Child Sex Abuse
- C. States with No Criminal Statute of Limitations for Child Sex Abuse
- D. Window Legislation Enacted (waiver of SOL for set period of time)
- E. Currently Pending Window Legislation (not law as of June 2013, but bills introduced)

**A. All 2013 Pending Child Sex Abuse Statutes of Limitations Reform Bills**

- CA** Senate Bill S.B. 131 (extending civil SOLs prospectively and creating 1-year window)
- IL** House Bill H.B. No. 1063 (eliminating criminal SOL)  
Senate Bill S.B. No. 1399 (eliminating civil SOL)
- MA** House Bill H.1455 (extending criminal and civil SOLs prospectively and creating 1-year window)  
Senate Bill S.633 (retroactively and prospectively extending civil SOL to age 55)
- MO** House Bill H.B. No. 247 (eliminating civil and criminal SOLs)
- NJ** Senate Bill S.B. 2281 (extending civil SOL and creating a 2-year window)
- NY** Assembly Bill No. A01771 (eliminating criminal and civil SOLs and creating a 1-year window)
- PA** House Bills H.B. 237 and 238 (eliminating criminal and civil SOLs and creating 2-year window)
- OR** House Bill H.B. 3284 (eliminating criminal SOLs for certain sex crimes committed against minors)
- WA** H.B. 5100 (extending criminal SOL to age 30)
- WI** LRB 2111 and 10056 (eliminating criminal and civil SOLs and creating 2-year window)

### **B. No Civil Statute of Limitations for Child Sex Abuse**

- Alaska - none for felony sex abuse/assault of minor, felony exploitation of minor
- Connecticut - none if events forming the civil claim led to conviction of first-degree aggravated sexual or sexual assault
- Delaware - none as to perpetrator, or as to gross negligence against employer
- Florida - none for sexual batteries committed against victims under 16 years old
- Maine - none
- Minnesota – none for victims abused under age of 18
- Guam - none for sex crimes against those under the age of 18

### **C. No Criminal SOL for Certain Child Sex Crimes**

- Arkansas – none (as of 2013)
- Alabama – none for victims abused when they were under 16
- Alaska – none for victims abused when they were under 18 (felony charge)
- Arizona – none for victims abused when they were under 15 or under 18 if the abuser is a parent, guardian, teacher or priest
- Colorado – none for felony child sexual offenses
- Connecticut – none for class A felonies
- Delaware - none
- Florida – none for 1st degree sexual battery (defined by Fla. Stat. § 794.011) for victims abused when they were under 18; for other charges of sexual battery (defined by Fla. Stat. § 794.011) for victims abused when they were under 16; for capital, and life felonies
- Georgia – none only against perpetrator where perpetrator's identity has been confirmed by DNA evidence
- Idaho – none for victims abused under 16, or for victims raped under 18
- Indiana – none if offense committed with threats or use of deadly force (class A)
- Kentucky – none for felonies
- Louisiana - none for prosecutions of crimes for that are punishable by death or life imprisonment, including aggravated rape and forcible rape
- Maine – none for incest; unlawful sexual contact; sexual abuse of a minor; rape or gross sexual assault, formerly denominated as gross sexual misconduct where victim under 16
- Maryland – none for felonies

- Massachusetts – none where victim under 16 (after +27 years DNA or other corroborating evidence needed)
- Michigan – none 1st degree crimes
- Minnesota – none if DNA evidence preserved
- Mississippi – none if (1) victim was abused during ages 14-16 and offender is 3 years older; (2) victim was abused under 14 and offender 2 years older; (3) victim was abused under 18 and abuser is in a position of authority or trust; or (4) involving touching or handling of children for lustful purposes
- Missouri - murder, forcible rape, attempted forcible rape, forcible sodomy, attempted forcible sodomy, or any class A felony
- Nebraska - none for 1st or 2nd degree sexual assault for victim of any age, or 3rd degree when victim was abused under the age of 16
- Nevada – none for felonies
- New Jersey – none for sexual assault or aggravated sexual assault
- New Mexico – none for 1st degree felonies
- New York – none for 1st degree felonies
- North Carolina - none
- Rhode Island – none for 1st degree sexual assault, and 1st and 2nd degree child molestation
- South Carolina – none
- South Dakota – none for class A, B, and C felonies; all child rape & forcible rape
- Texas – none for most sex crimes against young children
- Utah – none for rape of a child, object rape of a child, sodomy on a child, sexual abuse of a child, aggravated sexual abuse of a child
- Vermont – none for aggravated sexual assault
- Virginia – none for felonies
- West Virginia – none for sexual assault, 1st degree sexual abuse, sexual abuse by parent, guardian, custodian, or person in a position of trust to child
- Wisconsin – none for 1st degree sexual assault, or repeated class A or B felony offenses against the same child
- Wyoming - none
- Guam - none



**D. Window Legislation Enacted (waiver of SOL for set period of time)**

- California (2003)
- Delaware (2007-09)  
(also enacted follow-up window for health care providers when  
learned existing window did not cover them)
- Hawaii (currently open, 2012-2014)
- Guam (currently open, 2011-2013)
- Minnesota (currently open, 2013-2016)

**E. Currently Pending Window Legislation (not law as of June 2013, but bills introduced)**

- California (1-year)
- Massachusetts (1-year)
- New Jersey (2-year)
- New York (1-year)
- Pennsylvania (2-year)
- Wisconsin (2-year)

# SCHROETER GOLDMARK BENDER

September 23, 2013 - 4:07 PM

## Transmittal Letter

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Court of Appeals Case Number: 44874-2

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Objection to Cost Bill

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Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

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